United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ Affidavit of Mailing

75-1113

To be argued by
CAROL B. AMON

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Pgs

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1113

UNITED STATES OF AMERICA,
Appellee,

—against—

ARIE D. LEVY and NURIEL NURIELI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Assistant United States Attorneys,
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TABLE OF CONTENTS

Table of Cases

Table of Authorities

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Preliminary Statement

Arie D. Levy and Nuriel Nurieli appeal jointly from judgments of conviction of the United States District Court for the Eastern District of New York (Bartels, *J.*), entered March 21, 1975, which judgments convicted appellants, after a jury trial, of knowingly conspiring together to possess with intent to distribute a quantity of cocaine in violation of Title 21, United States Code, Section 846 (Count One), and possessing with intent to distribute approximately six grams of cocaine in violation of Title 21, United States Code, Section 841(a)(1) (Count Two). On March 21, 1975, appellant Levy was sentenced to a term of imprisonment of four years on each count to run concurrently subject to Title 18, United States Code, Section 4208(a)(2) and a special parole term of five years. On that same date, the appellant Nurieli was sentenced to a term of five years imprisonment on each count to run concurrently subject to

Title 18, United States Code, Section 4208(a)(2) and a special parole term of five years. Appellants are presently free on bail pending appeal.

On appeal, appellants advance the following claims: (1) the trial court erred in permitting the jury to consider as affirmative evidence the grand jury testimony of Sharon Sharabi a witness called by the Government at trial where appellants allege she suffered only from a lapse of memory that could not be refreshed and in view of a prior signed statement allegedly inconsistent with her grand jury testimony. As sub-issues, appellants allege this error was compounded by the introduction of consistent grand jury testimony and complain that the court imposed a double standard of impeachment; (2) the trial court erred in permitting the appellants' Israeli passports to be introduced into evidence; and (3) evidence introduced by the Government that Sharon Sharabi indicated that she feared reprisals due to her cooperation when she found the appellants had been released from jail, although not sufficient in itself to constitute reversible error, when considered together with the other alleged errors, constituted cumulative error sufficient to require a reversal.

Statement of Facts

A. The Government's Case

The following facts were developed at a pre-trial hearing held on appellants' motion to suppress the bag in which the cocaine was discovered at the time of their arrest (T. 1-61), and at trial (T. 62-385).*

In May of 1974, Arie Sharabi left the United States for Israel.** On the day of his departure, he was driven to the

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* Numerical References with the prefix "T" are to pages of the transcript of the suppression hearing and trial.

** Arie Sharabi was a named co-defendant but was a fugitive at the time of trial.

airport by the appellant, Arie Levy and Sharabi's wife Sharon. During the ride to the airport, Sharabi instructed his wife that any letters she received, particularly any letters concerning a table she was to take to Levy (T. 98-102, 204-205). These instructions were repeated by Levy (T. 100).

On September 20, 1974, Mrs. Sharabi received, among other documents, an airway bill from Avianca Airlines which indicated that a table shipped from Cali, Colombia on September 16, 1974, consigned to her in her maiden name, Sharon Barr, had arrived in New York on September 18, 1974. She also received a customs form indicating that the table could be picked up at Air France Cargo at John F. Kennedy Airport (T. 78-80, 107-108). That same day, Mrs. Sharabi received a phone call from Levy and he and Nurieli visited her apartment that evening (T. 110). On this occasion, Levy with Nurieli at his side, inspected the documents Mrs. Sharabi had received (T. 111).*

The following day, September 21, 1974, Levy came to Mrs. Sharabi's apartment under the pretense of taking her and her four year old daughter to the airport to pick up the table (T. 115). Levy, however, took them only so far as 86th Street and Bay Parkway. Explaining that he had other business to attend to, Levy instructed her to take a cab the remainder of the way and provided her one hundred dollars to cover any costs (T. 115-116).

At the airport, the table sent to Mrs. Sharabi was inspected by Inspector Samuel Rulnick of the Bureau of Customs who found concealed in the crossbar on the underside of the table a plastic bag containing over 213 grams

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* Although the appellant Nurieli claimed he had very poor knowledge of English, Mrs. Sharabi testified when she first met him they had a normal conversation in English (T. 106).

of cocaine (T. 65-72, 81-82, 119-120). Mrs. Sharabi was placed under arrest and taken into custody by Agent James Castillo of the Drug Enforcement Administration (T. 83). Mrs. Sharabi explained what had occurred that day to Agent Castillo and agreed to permit him and other Drug Enforcement Administration agents to accompany her to her apartment with the table (T. 121-122, 271-272, 286).

Shortly after Mrs. Sharabi and the agents arrived at her apartment she received a phone call from appellant Arie Levy (T. 126, 289).* Following the instructions of Agent Castillo, Mrs. Sharabi told Levy that everything was alright; he indicated he would be over to help her assemble the table (T. 126-127). Agent Castillo set the table up against the sofa in the living room, with the legs facing outward, and placed in the cross bar where the cocaine was found, a bag of white flour containing a six gram portion of the original cocaine (T. 290, 294). Agent Castillo and Agents Edward Coughlin and John Huber then secreted themselves in the bedroom of the apartment (T. 11, 294). Agent Castillo positioned himself behind the door where he could observe the table in the living room through a cracked panel in the door (T. 7, 12-13, 296). The appellant Nurieli entered the living room carrying a shopping bag and approached the table; he was followed by Levy and Mrs. Sharabi (T. 5, 37, 298). At that point in time, Levy asked Mrs. Sharabi to go make tea. As she walked out, Agent Castillo observed Levy squat down by the table and rock the cross support bar back and forth. Nurieli was sitting on the couch on the other side of the table with the shopping bag leaning down towards the table (T. 298-301). At trial, Mrs. Sharabi testified that she did not observe appellants do anything to

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* Prior to their arrival, surveillance agents observed two men in a car, who were later identified as the appellants Levy and Nurieli, drive past Mrs. Sharabi's apartment building (T. 517-518, 537), Levy and Nurieli were later observed to enter the building. Nurieli was carrying a shopping bag (T. 47, 521).

or around the table other than observing Levy trying to put the legs in (T. 130). The Government introduced as affirmative evidence, Mrs. Sharabi's grand jury testimony wherein she testified to having observed Levy take the bag of white powder out of the cross bar of the table and throw it to Nurieli who placed it in his shopping bag (A. 6-7).* She further testified in the grand jury that she entered the bedroom under the pretense of getting Levy a hammer and informed the agents that they had the cocaine (A. 8; T. 301). When the agents exited the bedroom and placed the appellants under arrest, they found the bag containing the flour and cocaine in Nurieli's shopping bag (303).

Appellants' passports were introduced into evidence showing that they departed Cali, Colombia on September 17, 1974, the day after the table was shipped from that location to Mrs. Sharabi (377).

B. The Defense Case

Both Nurieli and Levy testified at the suppression hearing. Levy claimed that the shopping bag and its contents, dirty laundry, belonged to him and was in his locked car at the time of his arrest (T. 18). Nurieli denied bringing it into the apartment (T. 23). On cross-examination, it was established that the bag supposedly belonging to Levy contained a shirt with a laundry mark in Nurieli's name (T. 25). Mrs. Sharabi who was called as a defense witness testified that Nurieli carried the shopping bag when he entered her apartment that evening (T. 34-44).

Appellants' motion to suppress was denied (T. 60).

At trial Levy, an air-conditioning mechanic, testified that he and Nurieli were in Cali, Colombia on a business trip to

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* Numerical References with the prefix "A" are to pages of the Government's Appendix.

market portable gas stoves (T. 420), that the agents took the shopping bag from his car after his arrest (T. 421), and that he had no knowledge there was cocaine in the table (T. 422). On cross-examination, Levy testified that he was attempting to sell the gas stoves for a company in New York the name and address of which he did not know, to people in Colombia and Peru whose names he could not recall (T. 428-431). The middle man in this business was a man named George who paid for the trip, but whose last name Levy did not remember (T. 428-429). The following day after the appellant Levy took the stand, "George" appeared as a defense witness carrying a portable gas stove (T. 496). Joseph George Silver testified that he provided the defendants with $1,500 to try and market these gas stoves in South America (T. 496-502). On cross-examination, Silver testified that neither he nor appellants had entered into informal agreements with the company in New York that manufactured these stoves (T. 508-509). The only records Mr. Silver testified that he had of this business venture was a withdrawal slip for the $1,500 he paid appellants.

No other witnesses were called by the defense.

ARGUMENT

POINT I

The trial court properly ruled admissible as affirmative evidence that portion of the grand jury testimony of Sharon Sharabi inconsistent with her trial testimony and properly rejected appellants' request for an instruction on an allegedly inconsistent prior out-of-court statement. Further, questioning as to consistent grand jury testimony where such testimony was not offered as affirmative evidence was not error.

(1)

Under the authority of *United States* v. *DeSisto*, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), the trial court ruled admissible as affirmative evidence that part of the grand jury testimony of government witness Sharon Sharabi which was inconsistent with her testimony at trial (T. 216; A. 5-8). Appellants seek to distinguish what in this instance is a textbook example of the applicability of the *DeSisto* rule on the following two grounds, namely that: (1) this allegedly was a situation where the witness simply had no recollection of the events, not one where she recalled the events differently; and (2) the grand jury testimony was untrustworthy because it was allegedly "at variance in every material detail" to a written statement given to a government agent prior to her appearance before the grand jury. These contentions are without merit.

First of all, it is difficult to fathom how appellants, in light of the trial record, argue that this was a situation where the witness suffered only from a failure of recollection which could not be refreshed and not one where she recalled events differently. Clearly, she recalled the events differentiy at trial and specifically and emphatically declared her grand jury testimony to be false (T. 178, 190).

On October 1, 1974, three months before the trial, Mrs. Sharabi testified before a grand jury that she had seen the appellant Levy remove a long, plastic bag containing white powder from beneath the table and throw it over to Nurieli who placed it in his shopping bag; that she had asked Levy if he needed a hammer for the table to which he responded affirmatively; and that she had gone into the bedroom under the pretext of getting the hammer and told the agents: "They got the stuff right now" (A. 6-8). At trial, Mrs. Sharabi testified not that she did not remember what happened but that, although she had seen Levy putting the table together that night, she had not seen anything come out of the table or anything else happen around the table (T. 133). Furthermore, she testified that it was Levy who had asked her to get a hammer; and when she described subsequent events, she omitted the statement she had made to the agents in the bedroom. Surprised by her testimony, the Government presented her with her grand jury minutes directed her attention to the inconsistent portions and asked her to read them to herself in an effort to determine whether or not her change in testimony might possibly have been from an honest lapse of memory (T. 142). Her memory was not refreshed (T. 143). Outside the presence of the jury, all inconsistent portions of the grand jury minutes were read to her. She acknowledged that the transcript read to her was accurate. Far from having her recollection refreshed however, she claimed that the grand jury testimony was false (T. 177, 190); and that she had given those answers because she feared both the agents who supposedly had threatened to send her to jail and the Assistant United States Attorney who had questioned her in the grand jury and who allegedly had threatened to fix her if she changed her story in the grand jury (T. 209). The procedure of reading the inconsistent grand jury testimony to Mrs. Sharabi was repeated in front of the jury and Mrs. Sharabi again acknowledged she had so testified but repeated that it was false (T. 182, 185, 190). There is no question that where, as here, a wit-

ness disowns his grand jury testimony, the *DeSisto* principle applies. See, *United States* v. *Rivera*, — F.2d —, (2d Cir. slip. op., 2263, 2274; decided March 13, 1975).

Moreover, assuming *arguendo* that appellants were correct in their characterization of Mrs. Sharabi's testimony as a continued lack of memory which could not be refreshed, they are no better off. Where, as in this instance, the witness does not deny that she made the statements in the grand jury and where there is evidence that the lack of memory is falsified, the Court in its discretion may properly admit the grand jury statements. *United States* v. *Insanna*, 423 F.2d 1165, 1170 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970). *See also, United States* v. *Klein*, 488 F.2d 481, 483 (2d Cir. 1973) (per curiam). There was evidence presented that several months after Mrs. Sharabi testified in the grand jury and only one month before she testified at trial, Michael Masud, a friend of both appellants for over four years, had moved in with Mrs. Sharabi (T. 151, 235), and during this time, he discussed her trial testimony with her and although he had no personal knowledge of the facts, convinced her she was confused about her testimony and told her how to testify (T. 196, 197, 236, 240). In addition, this Michael Masud was present in the courtroom during Mrs. Sharabi's trial testimony. Masud was called before the Court outside the presence of the jury and admitted that he had tried to attend a pre-trial interview of Mrs. Sharabi by the United States Attorney's Office and claimed that she was being brainwashed (T. 149-150).

It was further established that Mrs. Sharabi did not tell Agent Castillo at any time after her grand jury testimony that it was incorrect (T. 198). Judge Bartels expressed grave concern that Mrs. Sharabi's sudden change of testimony was as a result Masud's influence (T. 153, 155). Clearly, under these facts, even if Mrs. Sharabi had been simply claiming she did not remember what took place, the Court would have properly admitted her grand jury testimony. As the Court in *Insanna* observed (423 F.2d at 1170):

> . . . the Court has discretionary latitude in the search for the truth, to admit a prior sworn statement which the witness does not deny he made.

Appellants second argument as to the untrustworthiness of the grand jury testimony is similarly without substance. First of all, contrary to appellants' assertions, Mrs. Sharabi's statement to a government agent made after her arrest was not a sworn statement and far from being "at variance in every material detail" to her grand jury testimony, was different in only one detail. (Mrs. Sharabi's statement is reproduced in the Government's Appendix at p. 1-4).*

Thus, appellant's brief attaches an underserved importance to this statement. More importantly, its existence in no way affects or diminishes the trustworthiness of her grand jury testimony nor the propriety of admitting this evidence along with the trial testimony for the jury to decide which it chose to believe. The principle reason why grand jury testimony may be used as affirmative evidence as distinguished from any prior statement is that it is vouched for under oath and subject to the safeguard of fear of prosecution for perjury. See, *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945); *United States* v. *DeSisto*, *supra* at 934. The fact that a prior inconsistent statement exists in no way serves to remove these safeguards.

(2)

Appellants argue in the alternative that if the grand jury testimony was admissible, the Court erred in failing to instruct the jury that both the grand jury testimony and the trial testimony could be rejected and that the jury could

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* In Mrs. Sharabi's statement, she indicated Arie's friend (Nurieli) took the cocaine out of the table and put it in the shopping bag (A. 4). In variance to her grand jury testimony that Levy took the package of cocaine from the table and threw it to Nurieli who then placed it in the shopping bag.

accept the prior signed out-of-court statement in lieu thereof (Br. 12).

To have so instructed the jury would have been error. It is well settled that prior inconsistent out-of-court statements although they can be used for impeachment purposes may not be introduced as affirmative evidence. *Bridges* v. *Wixon, supra,* 326 U.S. at 153; *United States* v. *Briggs,* 457 F.2d 908, 910 (2d Cir.), *cert. denied,* 409 U.S. 986 (1972); *United States* v. *Pacelli,* 470 F.2d 67, 70 (2d Cir. 1972); *cert. denied,* 410 U.S. 983 (1973). Indeed, in this instance, had this been done the appellant Nurieli could have claimed error since the effect of an instruction on this inconsistency would have been to place evidence before the jury that Nurieli rather than Levy removed the package of cocaine from the table.*

Appellants cannot and do not complain that they were restricted in any way by the trial court in using this statement for impeachment purposes. Counsel for Mr. Levy was permitted to impeach the credibility of Mrs. Sharabi's testimony both at trial and in the grand jury by reading this statement to her before the jury. Throughout his summation, he effectively employed this inconsistent statement to at ack her credibility.**

Furthermore, the Court instructed the jury to consider prior inconsistent and contradictory statements in determining the credibility of witnesses (T. 708). Appellants were simply not entitled to have the Court take the further step and instruct that this prior out-of-court statement could be considered as affirmative evidence. See also, *United States* v. *Nuccio,* 373 F.2d 168, 172-173 (2d Cir. 1967).

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* One wonders why appellant Nurieli advances this argument on appeal.

** It is interesting to note that in his summation, Levy after pointing out the three inconsistencies as to what Mrs. Sharabi saw or didn't see asked the jury to accept her trial testimony on this point (T. 636).

(3)

Without providing any support for their argument or specifying how they were prejudiced, appellants further complain that error was committed when the Assistant was allowed to question Mrs. Sharabi on her entire grand jury testimony. On redirect examination of Mrs. Sharabi, the Assistant, starting at the beginning, reviewed the first several pages of Mrs. Sharabi's grand jury testimony question by question at which time the court interjected; the Assistant, then, in several questions summarized what she had said to the grand jury to exactly ascertain what she was claiming was false and what she alleged was true (T. 216-233). It is submitted that this procedure was not improper for the following two reasons. First of all, it was well within the discretion of the trial judge to permit this questioning to clarify the inconsistencies. See, *United States* v. *Bithoney*, 472 F.2d 16, 26 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973). Secondly, where Mrs. Sharabi had become a hostile witness, the Government was entitled to proceed in this manner as a method of impeachment.

In *Bithoney, supra*, the trial judge permitted witnesses who, as Mrs. Sharabi had occasion to give several accounts of an event on several different occasions, to be confronted with their entire testimony to make any charges or explanations they wished. The Court, in holding that this was not an improper procedure observed (472 F.2d at 26):

> We cannot see how this prejudiced any party in this case. There is no infallible rule or formula to govern the proof of prior inconsistent statements. Fairness to the witness is a paramount consideration . . . These matters are peculiarly within the discretion of the trial judge.

In this instance (Mrs. Sharabi, obviously not the most sophisticated or intelligent of witnesses), the trial judge in permitting this questioning was motivated by the desire to

clearly establish the extent of her recantation (T. 219, 740). Moreover, Mrs. Sharabi having testified unfavorably to the Government in the most crucial aspect of her testimony was subject to impeachment. Where a witness is being impeached, the cross-examiner is not restricted to questioning the witness only as to that part of statement which is inconsistent. Thus, the Government was entitled to demonstrate that Mrs. Sharabi conveniently changed her story only as to the one very significant detail thus attempting not to appear as a perjurer but at the same time not inculpating the defendants (T. 231). This consistent testimony was not offered as affirmative evidence. Only that part of the grand jury testimony which was agreed upon by the Government and counsel for appellants as inconsistent to Mrs. Sharabi's trial testimony was introduced into evidence (see redacted grand jury testimony, A. 5-8). Further, there could be no confusion in the minds of the jurors as to what part of the grand jury testimony was to be considered by them as affirmative evidence, since upon their request for grand jury testimony only the agreed upon inconsistent portion was read to them (T. 729-731).

(4)

Also under their first point on appeal, appellants make the frivolous charge that the court throughout the trial imposed a "double-standard" of impeachment. This argument is fashioned from the trial judge's statements during the suppression hearing that if the court honored the request of counsel to call Mrs. Sharabi, at the hearing, who at that time was a prospective government witness whom defense counsel had not subpoenaed, she would be his witness and he would be bound by her testimony and counsel would not be permitted to speak with her during the recess. While conceding that these events occurred at the suppression hearing only, appellants significantly do not claim on this appeal that the judge wrongly denied their motion to suppress.

With respect to their argument on calling Mrs. Sharabi as a witness, appellants' counsel acquiesced in the judge's statement that he would be bound by what Mrs. Sharabi said (T. 33). Further, counsel did not attempt to alter this situation by asking that she be declared hostile when her testimony was unfavorable. Appellants' charge that this double standard carried over into the trial, when the government was allowed to impeach Mrs. Sharabi with her grand jury testimony although the appellants were bound by what she said, is simply untrue. At trial, counsel was in no way hampered by the court in their impeachment of Mrs. Sharabi. On cross-examination, counsel for Levy was permitted to read from Mrs. Sharabi's written out-of-court statement to impeach her testimony. In summation, counsel again exposed the inconsistencies in her various accounts of the events. It cannot be seriously argued that a double standard was imposed in this or any other respect.

Furthermore, since appellants were apparently aware that Mrs. Sharabi was to be a government witness and obviously aware far in advance of the suppression hearing, that she had knowledge of the events concerning their motion, it was not unreasonable for the trial court to deny appellants' eleventh hour request to speak to her in the middle of the hearing. It is conceded that the government was not so restricted by the court but the court could hardly have denied the government its right to speak to its witness whose presence the government obtained. Appellants certainly had no absolute right to know in advance what her testimony would be since Mrs. Sharabi, as a prospective government witness in a criminal case, had a right to refuse to be interviewed by defense counsel prior to her testimony. See, *Byrnes* v. *United States*, 327 F.2d 825, 832-833 (9th Cir.), *cert. denied*, 377 U.S. 970 (1964); *United States* v. *Dryden*, 423 F.2d 1175, 1177 (5th Cir. 1970).

Finally, even had the trial judge been technically in error in these rulings, such error was unquestionably harmless. See, *Chapman* v. *California*, 386 U.S. 18, 87 (1966).

POINT II

Appellants' passports were properly admitted into evidence.

Appellants argue that their passports were admitted into evidence in violation of their Fifth Amendment right against self-incrimination.* This contention is without merit.

The Second Circuit in *United States* v. *Falley*, 489 F.2d 33, 41 (2d Cir. 1973) reached the issue of Fifth Amendment privilege and the production of passports. In *Falley*, the Court noted that the only circumstances under which the Fifth Amendment could be invoked to protect books and documents was where there was a tripartite unity of ownership, possession and self-incrimination. The Court found that as regards a passport, the element of ownership was lacking. The rationale of *Falley* is not, as defendants argue, limited to United States passports. The controlling factor is not that the United States Government happens to hold the primary right to ownership of the document but the fact that here exists a claim to ownership other than the possessor which renders the document public in nature. That claim in this instance rests in the State of Israel. During trial, contrary to appellants' claim that there was no showing of ownership in any one other than the appel-

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* Appellants suggest in their brief that the ruling of the Court that the passports were admissible was made in the absence of counsel for appellant Levy. This was not the case. On January 7, 1975, when counsel for appellant Levy did not appear, the Court ruled that the passports were to be unsealed and turned over to the Government. No final determination was made at that time that the passports would be admissible at trial. It was not until well into the trial, after both counsel for appellant Levy nad Nurieli were given several opportunities to argue the question of admissibility of the passports, and after the Court required a memorandum from the Government, that the Court ruled the passports admissible (Pretrial Discussion, A. 10-26; T. 167-174).

lants, the Government submitted competent and persuasive proof that the passports were the property of the State of Israel. The first paragraph in appellants' passports, which was translated in court by an interpreter, states in part: "This passport is the property of the Government of Israel. . . ." (T. 170). Further, the government offered a letter written by an Israeli Consul from the Office of the Consulate General of Israel in New York confirming that "Israeli passports are the property of the State of Israel" (A. 9).

Passports are simply not private documents of the sort the Fifth Amendment protects from compelled production. They are very public documents which are required to be displayed to others, namely government officials for travel across international boundaries. A foreign passport is a document which is necessary to enter the United States and is subject to inspection at the time of entry. See, e.g., Title 8, United States Code, Section 1182(26). It is well settled "that the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation for the enforcement of restrictions validly established." *Shapiro* v. *United States*, 335 U.S. 1, 33 (1947). Furthermore, it should be noted that the Honorable Orin G. Judd of the Eastern District of New York ruled in *United States* v. *Inniss*, 74 Cr. 791 (E.D.N.Y., filed April 9, 1975) that in view of the *Falley* and *Shapiro* decisions, the Fifth Amendment does not bar the enforcement of a subpoena which directed the defendant to produce his Panamanian passport for eventual use by the Government in trial (A. 27-36).

In addition, the information contained in a passport is non-testimonial, reflecting not private thoughts or discussion, but only the physical act of travel. See, e.g., *United States* v. *Dionisio*, 410 U.S. 1 (1973).

In sum, since appellants' passports are very public documents which are the property of the State of Israel and are to be kept for use in international travel, and which contain information of a non-testimonial nature, their admission in evidence does not violate appellants' rights under the Fifth Amendment.

POINT III

Evidence presented that Mrs. Sharabi expressed fear of appellants was properly offered in rebuttal to allegations that she feared and was threatened by the government. Any possible undue prejudice arising from this testimony was cured by the instruction of the court.

Appellants concede that the brief testimony of Agent Castillo that Mrs. Sharabi indicated to him fear of reprisal for her cooperation when she learned appellants had been released from jail, did not in itself constitute reversible error (T. 313). They argue, however, that when added to the other alleged errors, the result was cumulative error requiring a reversal. Having disposed of appellants' other claims of alleged error, the Government's response could simply be to accept appellants' concession. Reaching the merits of appellants' claim of error as to this testimony, however, the Government submits that this testimony was fair rebuttal and that any possible misunderstanding or prejudice evolving from the mention of jail was cured by an instruction from the Court which was agreed to by counsel for appellants.

In denying her testimony in the grand jury, Mrs. Sharabi stated that her allegedly false grand jury testimony was the product of her fear of both the government agents and the United States Attorney who questioned her in the grand jury (T. 209). These allegations of fear were vigorously developed in cross-examination (T. 199-213). In response,

the Government in addition to offering evidence that she was not threatened by government agents also sought to establish through Agent Castillo's testimony that it was not in fact the Government she feared but the appellants (T. 313).

This court has had occasion recently to uphold the propriety of such testimony in a situation strikingly similar to the instant case. *United States* v. *Rivera, supra.* There, as here, the witness indicated his grand jury testimony was the product of fear of federal agents. In response, the government elicited testimony that the witness had been informed of threats to his life in connection with his cooperation. This Court in *Rivera,* held: "It was competent for the Government not simply to deny that threats on its part had led to Vigo's grand jury testimony but also to assert that it was his recantation rather than his grand jury testimony which was due to fear . . ." *United States* v. *Rivera, supra* at 2278.

In any event, with respect to this testimony of Agent Castillo, the court specifically cautioned the jury:

> Ladies and gentlemen of the Jury, Mr. Castillo was asked whether or not Mrs. Sharabi said she was afraid, and then he told you what she said.
>
> Now, that is a simple state of mind that Mr. Castillo testified to, and the truth of what she said, that is Mrs. Sharabi said in connection with these defendants certainly has not been established nor is there any evidence that the defendants were at any time incarcerated, so you must disregard that statement completely.
>
> It was only stated to show what she said and that indicated her state of mind, but it certainly did not indicate the truth of those statements, and there is no such evidence that these men were ever incarcerated in any connection.

> I ask you to disregard that testimony of Mr. Castillo as to what Sharon Sharabi said, wipe it from your minds, it has no bearing in this case whatsoever. Now proceed.
>
> It must not be used to prejudice these defendants (T. 318-319).

Moreover, specifically with respect to the question of the mention of jail, on suggestion of counsel for appellant Levy (T. 321), the Court instructed the jury a second time as follows:

> [T]here is no evidence whatsoever that these defendants were detained except in connection with the arrest in this case, from which they were released a week or two thereafter; so that referring to Mrs. Sharabi's statement, there is nothing to show that these men were detained in connection with any other offense or arrest (T. 325-326).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: July 3, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
CAROL B. AMON,
Assistant United States Attorneys,
*Of Counsel.**

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*The United States Attorney's Office wishes to acknowledge the invaluable assistance of Laura A. Brevetti in the preparation of this brief. Ms. Brevetti is a third year law student at Georgetown Law Center.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of July 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Ronald Wohl, Esq.
1350 Avenue of the Americas
New York, N. Y. 10019

Joel Winograd, Esq.
205 W. 34th Street
New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this

3rd day of July 1975

Irene B. Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977